No. 20932

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

KENNETH G. STOREY, JR.
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION[1]

Appellant was charged in the following one count Indictment with refusing to be inducted into the Armed Forces of the United States on or about June 9, 1964 (R1):

"The Grand Jury Charges:

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1. In this brief, (R) will refer to the number of the records herein given by the Clerk of the Court for the Western District of Washington. (TR) will refer to the Court Reporter's transcript of proceedings. (EX) will refer to exhibits.

COUNT I

That on or about June 9, 1964, at Seattle, Washington, within the Northern Division of the Western District of Washington, KENNETH G. STOREY, JR., did knowingly, wilfully and unlawfully fail, neglect, and refuse to perform a duty required of him by the Universal Military Training and Service Act, and the rules, regulations, and directions made pursuant thereto, in that, having been duly and regularly ordered by a local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

All in violation of Title 50 U.S.C., App., Section 462, and 32 C.F.R. 1632.14."

Appellant entered a plea of "not guilty" on August 2, 1965, (TR 5), waived trial by jury (TR 5 and R2) and was tried by the Court on December 6, 1965 (TR). The case was continued until January 21, 1966, and appellant's Motion for Judgment of Acquittal was denied on that date (TR pp 4-6). Appellant was found guilty by the Court on January 21, 1966, (TR 6) and sentenced on February 25, 1966, to the custody of the Attorney General for a period of four years (R7). A timely notice of appeal was filed on March 2, 1966 (R8).

Jurisdiction of the District Court was based on Title 18, U.S.C. Section 3231. This Court has jurisdiction of the appeal under Title 28, U.S.C., Section 1291.

COUNTERSTATEMENT OF THE CASE

The testimony taken at the trial and the exhibits admitted into evidence established that the appellant was ordered by Local Board No. 6, Selective Service, Seattle, Washington, on May 25, 1964, to report for induction into the Armed Forces of the United States on June 9, 1964, at Seattle, Washington (EX 51). Appellant reported to the Induction Station in Seattle on June 9, 1964, but refused to be inducted into the Armed Forces (EX 11-16). At that time he signed a witnessed statement as follows:

> "I refuse to be inducted into the Armed Forces of the United States."
>
> /s/ Kenneth G. Storey, Jr.
> June 9, 1964" (EX 15)

The following summary of events leading up to appellant's refusal to be inducted is presented in chronological order for the Court's convenience:

February 4, 1958: The appellant, hereinafter referred to as "registrant," registered with Local Board No. 6 of the Selective Service System in Seattle, Washington. No claim for conscientious objector classification was made.

October 29, 1960: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was employed by the Boeing Airplane Company in a capacity involving the drawing of ground support equipment for minuteman missiles (EX 169).

November 11, 1960: Registrant was married (EX 167).

April 6, 1961: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was still employed by the Boeing Company

and that his duties included working on launch facilities equipment for minuteman missiles (EX 167).

November 3, 1961: Registrant advised Local Board No. 6 on a Current Information Questionnaire that his duties at Boeing Company involved designing and drawing missile test equipment (EX 165).

November 21, 1961: Registrant was ordered to report for an Armed Forces Physical Examination on December 8, 1961 (EX 163).

January 25, 1962: Registrant was advised that he had been found fully acceptable for induction into the Armed Forces (EX 159).

October 5, 1962: Registrant was divorced from his wife (EX 157).

March 1, 1963: Registrant advised Local Board No. 6 on a Current Information Questionnaire that he was still employed by the Boeing Company, working on support equipment for minuteman missiles (EX 157).

March 25, 1963: Local Board No. 6 received a letter from registrant in which he stated that he had become a conscientious objector, and requested that his classification be changed to 1-O, and that the special forms for conscientious objectors be sent to him (EX 155).

April 3, 1963: Registrant asked Local Board No. 6 if his current Boeing position on the minuteman missile program was classified as "defense work" (EX 153). (Please note that registrant did not resign from his Boeing employment until approximately one year later—March 31, 1964) (EX 55).

April 4, 1963: Registrant submitted complete conscientious objector forms to Local Board No. 6 (EX 131-139).

April 15, 1963: Registrant classified 1-A by Local Board No. 6 (EX 119).

May 20, 1963: Registrant appeared personally for a hearing before Local Board No. 6 and requested that his classification be changed to 1-O. The Board determined that Registrant should be retained in 1-A classification (EX 129 and 76).

May 26, 1963: Registrant was baptized into the Radio Church of God (EX 121).

July 23, 1963: United States Attorney was advised that the Appeal Board for the Western Federal Judicial District of the State of Washington had determined that the registrant should not be classified in Class 1-O or in a lower class (EX 112).

December 4, 1963: Registrant appeared before a Special Hearing Officer of the Department of Justice who found that registrant was sincere in his opposition to combatant military training and service, but that he was not sincere in his claimed opposition to all other forms of non-combatant service (EX 78).

February 27, 1964: T. Oscar Smith, Chief, Conscientious Section, Department of Justice, suggested to the Appeal Board that a sufficient basis in fact exists to deny registrant's claim to exemption from noncombatant service (EX 82).

March 4, 1964: Registrant was furnished with a copy of Mr. Smith's recommendation (EX 73).

March 31, 1964: Registrant quit his job at the Boeing Company (EX 55).

April 20, 1964: Appeal Board classified registrant 1-A-O by unanimous vote (EX 10).

May 25, 1964: Registrant was ordered to report for induction into the Armed Forces on June 9, 1964 (EX 51).

June 9, 1964: Registrant refused induction and signed a statement as follows: "I refuse to be inducted into the Armed Forces of the United States. /s/ Kenneth G. Storey, Jr. June 9, 1964" (EX 15).

QUESTIONS PRESENTED

1. Was the appellant induced into a prejudicial position when the local board failed to respond to a letter of inquiry?

2. Was the appellant denied due process when not informed of ostensibly derogatory information placed before the Appeal Board by his minister when appellant did in fact rebut said information?

3. & 4. Did the Local Board act arbitrarily in refusing to reopen appellant's file on the basis of new information received when no timely request to reopen was made by appellant and when the new information was nevertheless considered by the Appeal Board?

5. Was the Hearing Officer's report ambiguous, and if so, did the Department of Justice's recommendation to the Appeal Board deny appellant due process?

6. Was there a basis in fact for appellant's 1-A-O classification?

7. Did the Department of Justice predicate its recommendation on an illegal basis?

8. Was the appellant denied due process by the Hearing Officer's failure to advise him of a right to counsel and to remain silent?

9. Did the Court properly deny the introduction of certain witness' testimony?

SUMMARY OF ARGUMENT

1. The Local Board's failure to respond to appellant's letter of inquiry did not induce him into a prejudicial position because Local Boards have no duty to render advice in complex legal matters and because registrant already knew that his defense employment was "wrong."

2. Appellant was not denied due process when ostensibly derogatory information was sent to the Appeal Board by his minister because appellant did in fact rebut said information.

3. & 4. The Local Board did not act arbitrarily in refusing to reopen appellant's file on the basis of new information received because no timely request to reopen was made by appellant and because the new information was nevertheless considered by the Appeal Board.

5. The Department of Justice's recommendation to the Appeal Board was fair and the Hearing Officer's Report was not ambiguous or unfair.

6. There was a legally sufficient and ample basis in fact to support the 1-A-O classification given appellant.

7. The Department of Justice did not base its recommendation to the Appeal Board on an illegal basis.

8. The Department of Justice hearing officer did not deprive appellant of any constitutional rights to which he was entitled.

9. The Court properly denied the introduction of certain witness' testimony because a Court's review of a registrant's classification is limited to the evidence which was before the Selective Service Boards and on which said board acted.

ARGUMENT

I

THE LOCAL BOARD'S FAILURE TO RESPOND TO APPELLANT'S LETTER OF INQUIRY DID NOT DEPRIVE HIM OF CRUCIAL COUNSEL NOR INDUCE HIM INTO A PREJUDICIAL POSITION

Registrant contends that the Local Board's failure to respond to a letter of injuiry written on March 25, 1963, and pertaining to the propriety of his employment in the minuteman section of the Boeing Company deprived him of essential counsel and entraped him into prejudicial position. This argument is without merit because (1) the Court of Appeals for the Ninth Circuit has held that a Local Board has no duty to provide advisors for registrants, and (2) the registrant was well aware that his minuteman position was connected with warfare and that he was contributing directly to a war effort.

Selective Service Regulation 1604.14 provides:

> Advisors to registrants *may* be appointed by the Director of Selective Service . . . to advise registrants. . . . The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office. [emphasis added]

The Ninth Circuit Court interpreted this regulation in *Uffelman v. United States,* 230 F.2d 297 (9th Cir.

1956) by holding that the lack of a formally designated "advisor to registrants" did not amount to a denial of procedural due process, reasoning that the mandatory word "shall" was omitted from the above-cited regulation in a 1955 amendment and replaced with the permissive word "may." And in *Yaich v. United States,* 283 F.2d 613 (9th Cir. 1960), the Circuit Court again held that the appointment of advisors by the local draft boards has been discretionary and not mandatory since 1955. In view of the fact that local boards have no duty to provide advisors, it seems clear that such boards are under no duty to provide advice in matters involving complex legal questions; this is an area for private counsel.

However, Mrs. Dorothy Conner of the local draft board testified at the trial of the instant case that the names and addresses of three local private advisors *are* posted conspicuously in the local board office, even though not required by Court interpretation of the regulation (TR 28 and 29). If the registrant were genuinely concerned about the legal propiety of his employment at the Boeing Company and its effect upon his claim for a conscientious objector status, it would have been reasonable for him to personally visit the local board office and obtain the name of a private advisor from the bulletin board, or to have consulted his private attorney.

The registrant was well aware of the fact that his Boeing position was directly connected with warfare. In a letter written to the Local Board by the registrant and received by said Board on March 25, 1963, (EX 156) the registrant states:

> ". . . I am currently working at Boeing's as a draftsman in the minuteman section. As soon

> as I find another job, *that is not connected with warfare,* I will quit Boeing's. . . . (emphasis ours).

When asked at trial to explain how he arrived at the conclusion that his minuteman position was connected with warfare, Mr. Storey stated (TR p. 30): "I looked at the circumstances around me at the Boeing Company and I felt it was wrong." (Please note, however, that the registrant did not resign from his Boeing employment until approximately one year later—March 31, 1964 [EX 61].

If he were indeed conscientiously opposed by reason of religious training or belief to participation in war or in any endeavor connected with military preparation, as alleged, it is reasonable to assume that he would have terminated his minuteman employment *at that time* since he admittedly *knew* at that time the nature of his work. Why did he continue said employment? The only possible explanation is that the registrant was not conscientiously opposed by reason of religious or personal training and belief to participating in the minuteman program with its military role.

Registrant places great emphasis on the allegation that he was misadvised by his church and that his church sanctioned his Boeing employment. However, the minister who allegedly sanctioned Mr. Storey's minuteman employment wrote the following letter to Mr. Storey's Appeal Board:

> "The Resume of the Inquiry of Mr. Kenneth Gerald Storey, Jr. . . . eludes to the assumption that I sanctioned Mr. Storey working on missiles either directly or indirectly. Neither the Radio Church of God nor I teach that anyone should work on anything even remotely connected to the military. . . ." (EX 58).

Why then did this registrant request the Local Board's advice in the controversial letter of April 3, 1963, as to whether or not his employment at Boeing was defense work when, as we have seen above, he already *knew* it was ". . . connected with warfare. . . ." (EX 156) and he ". . . felt it was wrong . . ." (TR 30) The Local Board certainly could not look inside Mr. Storey's mind and inform him as to his subjective religious beliefs. The Government submits that the reason for writing the letter of April 3, 1963, was that Mr. Storey was more concerned with his draft status than with his conscience. He wanted to find out if he could have his cake and eat it too—if he could continue in a lucrative defense job and still obtain an exemption from military service.

The fact that the registrant was more concerned with his draft status than with his religious beliefs, if any, are further evidenced by his testimony at the trial of this case. After stating from the witness stand that he transferred from the minuteman program to the Transport Division of the Boeing Company in November, 1963, Mr. Storey further stated the reason for the transfer:

> "I chose the job in Renton (Transport Division), because I felt that it would be a better job in the eyes of my draft board." (TR 43)

The Assistant United States Attorney then inquired:

> "Was that the only reason you wanted that (the transfer) because it would make you look better in the eyes of your draft board," (TR 43) to which question Mr. Storey replied: "Yes" (TR 43).

Hence, the government concludes that under the circumstances of this case the Local Board's failure

to respond to Mr. Storey's letter of April 3, 1963, did not deprive him of crucial counsel and did not induce him into the very circumstances upon which the Selective Service System denied him a 1-O classification. Assuming the Board had responded and told Mr. Storey that his minuteman job would disqualify him from a 1-O classification, he testified that "I would go ahead and terminate my job." (TR 31) Such termination then would have resulted from the fact that the minuteman employment jeopardized Storey's chances of obtaining a 1-O classification, *not* because his religious training and beliefs prevented him from making machines of war.

II

APPELLANT WAS NOT DENIED DUE PROCESS WHEN OSTENSIBLY DEROGATORY INFORMATION WAS PLACED BEFORE THE APPEAL BOARD BECAUSE APPELLANT DID IN FACT SUBMIT REBUTTAL EVIDENCE

The registrant contends that he was denied due process because he was not informed of nor afforded the opportunity to rebut information contained in a letter dated April 2, 1964 (EX 58) and sent to the Appeal Board by a minister of registrant's church.

Notwithstanding registrant's assertion, registrants's Selective Service file shows that rebuttal evidence was in fact presented to the Appeal Board and was in fact available for consideration at the April 20, 1964, meeting of the Appeal Board at which meeting registrant was classified 1-A-O. The rebuttal evidence was as follows:

1. (EX 55) A letter written by the registrant on March 31, 1964, and received by the Board on April 2, 1964. The registrant stated in said let-

ter that he had terminated his Boeing employment.

2. (EX 59-61) A letter written by the registrant on March 31, 1964, and received by the Local Board on April 2, 1964. The registrant reviews his entire religious history in said letter and specifically rebuts the letter sent by his minister.
3. (EX 63-66) A letter written by Mr. Gerald A. Lindberg on March 31, 1964, and received by the Board on April 2, 1964. This letter reviews registrant's religious history and attests to the registrant's sincerity.
4. (EX 67-69) A letter written by registrant's attorney, Mr. Ralph K. Helge on March 30, 1964, and received by the Board on April 1, 1964. Mr. Helge elaborated upon and explained the misunderstanding between the registrant and his minister concerning his minuteman employment, the topic of the controversy.

All of the above-stated evidence was received by the Board during the first few days of April, 1964, and was certainly available to the Board at their April 20, 1964 meeting. It appears to Government counsel that the letters from the registrant himself, from a close friend and from his attorney are ample to rebut one possibly derogatory letter from his minister.

Furthermore, the cases cited in Registrant's brief are not in point. In *Gonzales v. United States,* 348 U.S. 407 (1955) the registrant was not furnished a copy of the Department of Justice's recommendation to the Appeal Board. In the instant case, Mr. Storey was sent a copy of the recommendation on March 4, 1964, and was specifically advised of his right to file a reply with the Appeal Board (EX 73).

In *Chernekoff v. United States,* 219 F.2d 721 (1955) the appeallant was not furnished a copy of

the Resume of the Inquiry prior to his hearing before the Department of Justice Hearing Officer. Nothing is said in *Chernekoff* about derogatory information received *after* the registrant has appeared before the Hearing Officer.

In summary, the registrant was not denied due process because he did in fact present rebuttal evidence to the Appeal Board which evidence was before the Board for consideration at the same time the ostensibly derogatory letter was before the Board.

III & IV

THE LOCAL BOARD DID NOT ACT ARBITRARILY IN REFUSING TO REOPEN APPELLANT'S FILE BECAUSE NO TIMELY REQUEST TO REOPEN WAS MADE AND THE NEW INFORMATION WAS CONSIDERED ANYWAY

Registrant contends in his brief that the Local Board refused for the wrong reasons to reopen his file when it received new information concerning his employment at Boeing and his baptism into the Radio Church of God. It is the Government's position that the reason for refusal is immaterial, because the reason itself was not prejudicial to the registrant. However, the registrant goes further by contending that the refusal was arbitrary, and cites *Stain v. United States,* 235 F.2d 339 (9th Cir. 1959) as authority. *Stain,* supra, is easily distinguishable because the Local Board had completely refused to consider the defendant's Special Form for Conscientious Objectors submitted after he had been classified 1-A, whereas, in the instant case, the Board did afford Mr. Storey all of the special procedures designed for conscientious objectors after he first re-

quested such status on March 25, 1963, including a personal appearance before the Local Board on May 20, 1963, a review by the Appeal Board on July 18, 1963, and an appearance before a Department of Justice Hearing Officer.

The registrant also cites *Brown v. United States,* 216 F.2d 258 (9th Cir. 1954) as authority for the contention that a local draft board has a *duty* to reconsider a classification whenever *any* new information regarding a change of status is declared. However, the Selective Service Regulation 1625.2 states that the local board *may* reopen and consider anew the classification of a registrant, a discretionary duty. The only *mandatory* duty placed on a local board is to reopen and reconsider a classification only when the State Director of Selective Service so requests (Selective Service Regulation 1625.3). And the Court of Appeals for the Ninth Circuit stated in *Badger v. United States,* 322 F.2d 902 (9th Cir. 1963) at p. 908:

> Furthermore . . . the local board was under no duty to reopen and consider anew the classification of appellant since . . . reopening does not follow automatically from such a request when made.

Selective Service Regulation 1625.4 provides:

> When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that such request fails to present any facts in addition to those considered when the registrant was classified, or *even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification* . . . [emphasis added]

Now that the law has been set forth, let us consider the facts of the instant case. Appellant's chief concern appears to be that new evidence which would allegedly qualify him for a conscientious objector classification was never considered by the Board, specifically the letter written by the registrant on May 28, 1963, in which he stated he had been recently baptized into the Radio Church of God (EX 121), and the registrant's letter of March 31, 1964, in which he advised the Board he had terminated his Boeing employment. The fact is that both of these letters were before the Appeal Board at their April 20, 1964, meeting at which time the Board reviewed the registrant's file and determined to classify him 1-A-O. Hence, this new information *was* considered.

Furthermore, Mr. Storey did not request that his classification be reopened in either the letter concerning his baptism (EX 121) or the letter concerning his termination of employment at Boeing (EX 55). The Court of Appeals for the Ninth Circuit held in *Shaw v. United States,* 264 F.2d 118 (9th Cir. 1959) that a registrant whose written communication to his local draft board did not request a reopening of his classification is not entitled to have his classification reopened. A mere notice of a change in a status cannot be viewed as a request to reopen. *Taylor v. United States,* 285 F.2d 703 (9th Cir. 1960). Therefore, not having requested the Local Board to reopen his file, Mr. Storey cannot complain now, especially in view of the fact that the new information was before the Appeal Board during its April 20, 1964, meeting.

The file further reveals that on May 25, 1964, Local Board No. 6 ordered Mr. Storey to report for

induction. Eleven days later, on June 5, 1964, Mr. Helge, Storey's attorney, then wrote the local board requesting that the Order for Induction be cancelled and Storey's classification be reopened (EX 46). The June 5 request to reopen is the only request to reopen contained in the file, and as such was submitted too late. 32 C.F.R. Section 1625.2 (Rev. 1951) provides in part:

> ". . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status over which the registrant had no control."

Accord: *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959); *Feuer v. United States,* 208 F.2d 719 (9th Cir. 1953).

Hence, the Government concludes (1) the new information was in fact considered by the Appeal Board at its April 20, 1964, meeting; (2) the Local Board did not deny registrant due process by failing to reopen his classification because he failed to request such action; and (3) the request to reopen from registrant's attorney was submitted too late.

V

DEPARTMENT OF JUSTICE'S RECOMMENDATION TO THE APPEAL BOARD WAS FAIR AND HEARING OFFICER'S REPORT WAS NOT AMBIGUOUS OR UNFAIR

The Hearing Officer's report to the Department of Justice certainly appears to Government counsel to be unambiguous, and the Department's rec-

ommendation to the Appeal Board appears to be a fair resumé of the Hearing Officer's report. Looking at the report as a whole, the Hearing Officer is simply saying that the registrant is sincere in his objection to combatant duty and to hospital or Saturday work, but is not sincere in his objection to all other non-combatant military duty. The Department of Justice then passes this information on to the Appeal Board. To read any other meaning into the reports requires an abundance of imaginative conjecture.

VI

THE 1-A-O CLASSIFICATION GIVEN APPELLANT HAD A BASIS IN FACT WHICH WAS LEGALLY SUFFICIENT

It should be noted that the Selective Service Act makes no provision for judicial review of the actions of local boards or the appeal agencies. Section 10(a)(2) of the Act provides "decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

However, the Courts have interpreted Congressional silence on this matter to mean that a very limited degree of judicial review is permissible. Thus, the applicable standard of judicial review in conscientious objector matters was well stated in *Estep v. United States,* 327 U.S. 114, 122-123 (1946):

> ". . . courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the

local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Even if a Court or jury would reach a different decision and, for that matter, even if the Board is erroneous, this is no defense as long as there is a basis in fact for the decision. *Cox v. United States,* 332 U.S. 442, 453 (U.S.S.C. 1947); *Dickinson v. United States,* 346 U.S. 389, 393 (U.S.S.C. 1953).

The general rule, as announced by the Ninth Circuit in *White v. United States,* 215 F.2d 782 (9th Cir. 1954), *cert. den.* 348 U.S. 970, is that a registrant's willingness to engage in the production of defense materials constitutes a basis in fact for denial of his conscientious objector claim for exemption from non-combatant military service. The same rule has been adhered to in numerous other circuits. *See Blalock v. United States,* 247 F.2d 615 (4th Cir. 1957); *Meredith v. United States,* 247 F.2d 622 (4th Cir. 1957); *Robertson v. United States,* 208 F. 2d 166 (10th Cir. 1953); *United States v. Neverline,* 266 F.2d 180 (3rd Cir. 1959). It should be noted that the registrant in *White,* supra, did not even work directly for Douglas Aircraft Company, which had a war contract, but for a firm which supplied parts to Douglas. Nevertheless, White's employment was held to be a sufficient "basis in fact" to sustain the denial of his 1-A-O classification.

Now, let us examine the following objective facts which were available to the Appeal Board when it finally classified Mr. Storey 1-A-O on April 20, 1964. The Government contends that said facts are ample in accordance with the "basis in fact" criteria to sustain the Board's classification:

1. A Current Information Questionnaire received

from Storey on October 29, 1960, stating that he was employed at Boeing in a capacity involving the drawing of ground support equipment for minuteman missiles (EX 169).

2. Current Information Questionnaire received from Storey on April 6, 1961, stating he was still employed at Boeing and worked on launch facility equipment for minuteman missiles (EX 167).

3. Current Information Questionnaire received from Storey on November 3, 1961, stating that his Boeing duties involved designing and drawing missile test equipment (EX 165).

4. Current Information Questionnaire received from Storey on March 1, 1963, stating that his Boeing Employment still involved work on support equipment for the minuteman missile (EX 157).

5. A letter from Mr. Storey written on March 25, 1963, in which he acknowledged that his Boeing position was connected with warfare (EX 156) coupled with the fact that in spite of such knowledge he continued his Boeing employment for another year—until March 31, 1964 (EX 61).

6. Storey's resignation from Boeing on March 31, 1961, closely followed his receipt on March 4, 1964, of a copy of the Department of Justice's recommendation to the Appeal Board that a sufficient basis in fact exists to deny his claim to exemption from noncombatant service.

7. Statements from fellow Boeing employees that Storey must have realized his work was involved with the launching of nuclear missiles, but that he never objected to this type of work nor did he ever express opinions concerning war or religion (EX 86 & 90).

8. A recommendation from the Department of Justice based on the report of a hearing officer who had an opportunity to personally observe Storey's demeanor, that Storey appeared to be embarrassed and uncertain in his attempted justification of his employment involving minuteman missiles.

9. The Local Board's denial of Storey's conscientious objector claim based in part on the Local Board's personal observation of Storey's demeanor and creditability during his personal appearance before the Local Board on May 20, 1963.

The Government contends that the above-mentioned facts are ample to support the Appeal Board's decision that the registrant should be classified 1-A-O. This is not a situation where a decision was based on one isolated fact by one agency; rather it is a situation where the registrant was given every available opportunity to prove his claim for exemption from non-combatant service, but failed to convince anyone. It is a situation where the Local Board, Hearing Officer, Department of Justice and the Appeal Board have taken into consideration evidence of events concerning the registrant over a period of several years and then the Appeal Board made its final classification decision on the basis of these facts.

Additional information supporting the Appeal Board's classification was available to the trial court, in that Mr. Storey testified the reason for his transfer from the minuteman program to the Transport Division at Boeing in November, 1963 was: "because I felt that it would be a better job in the eyes of my draft board." (TR 43). If Storey were indeed sincere in his opposition to working on

military equipment and to non-combatant military duty, it is reasonable to assume that he would have transferred from the minuteman to Transport on the basis of his religious or personal convictions, not because he felt that a job in the Transport Division "would be a better job in the eyes of my draft board," as he testified at the trial of this case.

Hence, the Government concludes there was indeed a" basis in fact"for Mr. Storey's 1-A-O classification, and that it was not illegal, arbitrary or capricious.

VII

THE DEPARTMENT OF JUSTICE DID NOT BASE ITS RECOMMENDATION TO THE APPEAL BOARD ON AN ILLEGAL BASIS

Registrant contends that the Hearing Officer and Department of Justice illegally commented upon the validity of registrant's beliefs. Government counsel has reread both recommendations several times and can find nothing at all to support such a contention. Absolutely nothing appears in either report which could be remotely construed as the opinion of the Hearing Officer or Mr. T. Oscar Smith regarding the validity, goodness or badness of registrant's religious beliefs. Looking at the overall message carried in both reports, the only reasonable construction is that both writers feel that the registrant is since in his opposition to participation in combatant services, and to working in the area of blood transfusion or on Saturdays, but that he is not sincere in his claimed opposition to all other forms of non-combatant service. There is certainly not any comment on the validity of such beliefs,

and the provisions of *United States v. Seeger,* 380 U.S. 163 are complied with.

Furthermore, any recommendation made by the Department of Justice is not binding on the Appeal Board. Selective Service Regulation 1626.25(e) provides:

> . . . the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, *but shall not be bound to follow,* the recommendation of the Department of Justice . . . [emphasis added] *Accord, Ashauer v. United States,* 217 F.2d 788 (9th Cir. 1954).

Hence, the Appeal Board had the authority to follow the Department of Justice's recommendation, to modify it, or to completely disregard it.

VIII

THE DEPARTMENT OF JUSTICE HEARING OFFICER DID NOT DEPRIVE APPELLANT OF ANY CONSTITUTIONAL RIGHTS TO WHICH HE WAS ENTITLED

Appellant contends he was deprived of his constitutional rights on grounds that the Hearing Officer did not advise him of a right to remain silent, a right to counsel, and a right to have counsel appointed if he were indigent. The government submits that said contention is without basis because (1) appellant was not under "custodial interrogation" at the time of his appearance before the Hearing Officer; (2) appellant *was* advised of his right to have an attorney present at the hearing; and, (3) the Hearing Officer had no duty to advise appellant of a right to court-appointed counsel under the law in effect at the time of trial.

1. The United States Supreme Court held in *Miranda v. Arizona,* ..... U.S. ....., 16 L.Ed.2d 694 (1966) that defendants must be advised of certain rights whenever questioned by law enforcement officers while under "custodial interrogation." The Court then went on to define the term as follows:

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

When appellant appeared before the Hearing Officer on December 4, 1963, he was not under "custodial interrogation" for the following reasons:

a. Appellant had not yet committed any crime. He didn't commit a crime until five months later when, on June 9, 1964, he refused to be inducted into the Armed Forces. Hence, when he appeared before the Hearing Officer, he was *not* being investigated or interrogated for a crime which had already been committed, as in *Miranda* and the related cases.

b. The questioning at the hearing was not conducted by "law enforcement officers." Rather, the hearing was administered by a private Seattle attorney who volunteers his services without fee on a part-time basis to the Department of Justice for the purpose of conducting such hearings.

c. The purpose of the hearing was to ascertain facts upon which to base a recommendation as to the Appellant's sincerity in his claim to a conscientious objector exemption from military service. The purpose was to be objective and

unbiased, not to obtain a confession to a crime which had not even been committed.

d. The Hearing was not held in a "police dominated atmosphere," at the local jailhouse, as in *Miranda* and the related cases, but in the relative calm of a private attorney's office. The appellant had been invited to "present witnesses in support of his claim" and was further advised of his right to "have an attorney, relative, friend, or other advisor present at the hearing." (Notice of Hearing contained on p. 8, Appendix D of Appellant's brief.) And the record indicates the appellant was in fact accompanied by a member of the Radio Church of God as a witness (EX 76), a far cry from the situation in *Escobedo v. Illinois,* 378 U.S. 478 (1964).

e. The appellant was not under any legal compulsion to even attend the hearing, and could have walked out of the Hearing Officer's office at any time he desired during the course of the hearing.

Therefore, it appears obvious to Government counsel that appellant was not under custodial interrogation, nor had he been deprived of his liberty in any significant way at the time the hearing was conducted. Accordingly, the principles announced in *Escobedo, Miranda* and the related cases should not apply.

2. Appellant *was* advised of his right to have counsel present at the hearing. (Appellant's Brief p. 59 and Appendix p. 8 and 9). However, he chose only to bring a member of his church as a witness (EX 65).

3. The Hearing Officer had no duty to advise appellant of a right to court-appointed counsel if he were indigent because the hearing was held on December 4, 1963, and the trial of this case on December 6, 1965. *Johnson v. State of New Jersey,* ..... U.S. ....., 34 U.S. Law Week 4592 (1966) provides that the principle of *Miranda* requiring advice as to right to court-appointed counsel shall apply only to those cases tried subsequent to June 13, 1966.

IX

THE COURT DID NOT ERR IN EXCLUDING TESTIMONY OF APPELLANT'S WITNESSES AT TRIAL

The general rule is that the Court's review of a registrant's classification must be limited to the evidence which was before the Selective Service Boards and on which they acted. *Cox v. United States,* 332 U.S. 442, 68 S. Ct. 115; *Ashauer v. United States,* 217 F.2d 788 (9th Cir. 1954). Hence, the testimony of appellant's witnesses at trial could not be considered by the court.

CONCLUSION

The Government respectfully contends that all of the registrant's assertions regarding denials of procedural due process are without merit. The Court of Appeals for the Ninth Circuit stated in *Knox v. United States,* 200 F.2d 398 (9th Cir. 1952):

> Procedural irregularities which do not result in prejudice to the registrant are to be disregarded.

And, in *Shaw v. United States,* 264 F.2d 118 (9th Cir. 1959), the same Court stated:

> An appellate court is not required to search the record with a microscope, in an effort to find minute but harmless flaws in the work of administrative bodies of the lower courts.

Regarding the applicable standard of judicial review of administrative decisions, the United States Supreme Court stated in *Witmer v. United States,* 348 U.S. 375 at p. 380:

> It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgment on the weight of the evidence for those of the designated agencies. *Nor should they look for substantial evidence to support such determinations.* [Cases cited]. The classification can be overturned only if it has "no basis in fact." [Emphasis added]

The United States of America respectfully contends that there is sufficient evidence to constitute a "basis in fact" for the registrant's classification. Furthermore, he has been afforded every opportunity available under the law to prove his claim to exemption from non-combatant service, but has failed to do so. Accordingly, the Government respectfully urges that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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DATED at Seattle, Washington
this 29th day of August, 1966.

MICHAEL J. SWOFFORD